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No. 689

In the Supreme Court of the United States

OCTOBER TERM, 1957

BOLINDERS COMPANY, INC., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CL[illegible]

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

Statutes:

Administrative Procedure Act, Section 1009, 60 Stat. 237, 243, 5 U. S. C. 1001, *et seq*	6, 7
First War Powers Act, 1941, 55 Stat. 838, Section 201	2, 6, 7
First War Powers Act, 1941, as amended, 64 Stat. 1257	2, 7

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OCTOBER TERM, 1957

No. 689

BOLINDERS COMPANY, INC., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims is reported in 153 F. Supp. 381.

JURISDICTION

The judgment of the Court of Claims was entered July 12, 1957. Petitioner's timely motion for a rehearing was denied on October 9, 1957. The petition for certiorari was filed on December 26, 1957. The jurisdiction of this Court presumably arises under 28 U. S. C. 1255.[1]

[1] The petition (Pet. 2) refers to 28 U. S. C. 2101 (c) as the basis for this Court's jurisdiction.

QUESTION PRESENTED

Whether those provisions of the First War Powers Act, authorizing the amendment or modification of contracts to aid the prosecution of the war or facilitate the national defense, contemplated justiciable rights in contractors.

STATUTES INVOLVED

The First War Powers Act, 1941 (55 Stat. 838), provides in pertinent part:

> SEC. 201. The President may authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war: * * *

In an Act to amend and extend Title II of the First War Powers Act, 1941 (64 Stat. 1257), it is provided:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That Section 201 of the First War Powers Act, 1941 (55 Stat. 838) is hereby amended by striking out the words "the prosecution of the war effort" and the words "the prosecution of the war" appearing in such section, and inserting in lieu of each

stricken provision the words "the national defense"; * * *

SEC. 2. Title II of such Act, as amended, shall remain in force during the national emergency proclaimed by the President December 16, 1950, or until such earlier time as the Congress by concurrent resolution or the President may designate, but in no event beyond June 30, 1952.

* * * * *

STATEMENT

In June 1950, petitioner entered into a contract with the United States to manufacture and supply 214 Diesel engine power units at a unit price of $3,947 (R. 1–2). The number of units to be supplied was increased to 228 by an amendment to the contract dated March 13, 1951 (R. 2).

Because of the increased costs of labor and material caused by the Korean conflict, petitioner requested an upward adjustment in the contract price. Under the authority granted by the First War Powers Act, *supra,* the President had authorized the Department of Army to enter into, modify, or amend contracts whenever such action would "facilitate the national defense" (R. 27). The Army Contract Adjustment Board, acting pursuant to this authority, granted petitioner's application in a decision dated August 10, 1951 (R. 12), and instructed the contracting officer to increase the total contract price "in the amount of $169,246.68 only" (R. 16). This total was arrived at by allowing a unit increase of $742.31 which the Board found to be the difference between the bid unit cost of $3,947 and the actual unit cost of $4,689.31

as reported by the Army Audit Agency on a basis of the prices existing on February 20, 1951.

Between the time in which the contracting officer forwarded the application for an increase in price and the date on which the Board made its decision, a number of amendments were made to the contract, all with petitioner's consent (R. 132). These amendments called for various decreases and increases in the unit costs, so that, at the time of the Board's decision, the unit price called for in the contract was $3,838.20 for 10 of the units and $3,859.70 for the remaining 218 units (R. 132). In accordance with the decision of the Board, the contracting officer amended the contract so as to give petitioner an increase of $742.31 on each unit for a total increase of $169,246.68 (R. 18–21). This increase was added to the adjusted contract prices rather than onto the $3,947 original price. The Board's decision, being based on the original prices, had authorized the total increase mentioned above, and in another paragraph had authorized that the increase be from $3,947 to $4,689.31 (R. 16).

Even though the total authorized increase was "$169,246.68 only", petitioner contended that the contracting officer should have increased the adjusted prices from the decreased unit prices to $4,689.31 per unit. This would have resulted in a total increase of considerably more than $169,246.68. Petitioner's claim to this additional amount was considered and denied. The Board, affirming decisions by the contracting officer and the Chief of Engineers, held that petitioner had in fact been given the total amount of

relief authorized on the initial consideration of its application (R. 135). The Board further held that no further amount of price adjustment could be considered as justified to "* * * facilitate the national defense * * *" since petitioner was threatened with bankruptcy or receivership and the amount involved could not forestall that happening; and that, in any event, there were ample alternative sources of supply for the same type of unit (R. 40–45).

The Court of Claims, after reciting the facts, ruled that the First War Powers Act was not passed for the benefit of contractors but rather for the benefit of the entire nation in order to facilitate prosecution of the war, and that the allowance or disallowance of increases under its provisions was committed to the sole discretion of the President and those to whom his power was delegated, and was not subject to review by the courts (Pet. App. 21–26).

ARGUMENT

At the outset, it should be noted that the total authorized increase in price of $169,246.68 was actually paid to the petitioner. There is therefore no basis for any complaint that an increase was granted but not paid. Nor is there any basis for petitioner's suggestion (Pet. 17) that this case "concerns the carrying out by a subordinate [the contracting officer] of a determination which had been made by the ultimate authority [the Board] and was binding upon him." Instead, there is only a claim that a higher amount should have been awarded on the basis of an outdated (and hence erroneous) unit price figure referred to in the Board's decision.

Petitioner's entire case is thus founded on his erroneous assumption that Section 201 of the First War Powers Act, as amended, *supra,* created justiciable rights in defense contractors who might show that they had made a bad bargain on a defense contract and were forced to take a loss. Realizing that prior to the Act it could not possibly have based a cause of action on the theory that it had made a bad bargain, petitioner argues that Congress intended that no contractor should be allowed to suffer financial hardships under a defense contract.

The Act was clearly intended only to give the President the power to alter contracts when, in the discretion of the President and his delegatees, such an alteration was vitally necessary to the national defense. Under no interpretation, however strained, can the Act be said to have created a new basis for a cause of action against the United States.

The Court of Claims correctly recognized that the only purpose of the Act was to facilitate the national defense, and that actions taken are not subject to court review.[2] The granting of price increases where

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[2] Section 1009 of the Administrative Procedure Act, 60 Stat. 237, 243, 5 U. S. C. 1001, *et seq.* (Pet. 5–6), which petitioner cites is not applicable by its own terms. Section 1009 begins as follows:

> § 1009. *Judicial Review of Agency Action*
>
> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such

they would facilitate the national defense was committed to the sole discretion of the executive, and the Act created no legal rights to price increases for contractors.

As the petitioner had no cause of action prior to the Act, and as the Act clearly did not create a cause of action, it follows that there is no question presented here which would call for judicial review at any level.

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action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Section 201 of the First War Powers Act, as amended, *supra*, is as clear a [redacted] of agency action being by law committed to the discretion of the President and his delegates as one could find.

Moreover, the First War Powers Act, as amended, *supra*, was excluded from the operation of the Administrative Procedure Act, *supra*, by Section 1001 thereof which provides as follows in pertinent part:

> (a) * * *, there shall be excluded from the operation of this chapter (1) * * * or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter * * *

The First War Powers Act as originally enacted was to remain in force during the continuance of the war and six months thereafter. As amended, *supra*, it was to remain in force during the national emergency as proclaimed by the President, or such earlier time as the Congress or President may designate, but in no event beyond June 30, 1952. These repeal provisions alone, it is submitted, are sufficient to exclude the First War Powers Act, *supra*, from the operation of the Administrative Procedure Act.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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